IN THE HIGH COURT OF JUDICATURE AT BOMBAY

O.O.C.J.

APPEAL NO.1025 OF 2000

IN

SUIT NO.1399 OF 1981

...

1. Purshottam S. Talreja
2. Motilal S. Talreja
both Indian Inhabitants having
their place of business
at 504, Linking Road, Khar,
Mumbai- 400 052 ...Appellants
(Orig.Plaintiffs)

v/s.

1.Coover Phiroze Bharucha
2.Perin Coover Bharucha
3.Niloufer Coover Bharucha
4.Ferneiz coover Bharucha
all of Pune Indian Inhabitants
residing at 19, M.G.Road,

Pune-1,
5.Ferzind F. Kothawalla,
residing at Mira Society,
Salisbury Park, Pune ...Respondents
(Orig.Defendants)

...

Mr.V.P.Vaidya i/b Madhukar Munim & Co. for the Appellants.
Mr.V.T.Tulpule i/b A.I.Patel for Respondents Nos. 1 to 3.
Mr.P.N.Patwardhan for Respondent No.5.

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CORAM: D.K.DESHMUKH &
J.H.BHATIA, JJ.
DATED: 27TH AUGUST,2007

JUDGMENT:(PER D.K.DESHMUKH, J.)

1. By this Appeal, the original Plaintiffs challenge the judgment and decree dated 8-9-2000 passed by the learned single Judge dismissing Suit No.1399 of 1981. That civil suit was filed by the present Appellants seeking a decree of specific performance of the

agreement of sale dated 23-1-1979 in relation to the suit property. According to averments in the plaint, the Plaintiffs are the builders by profession carrying on business at Bombay. Defendants Nos. 1 to 5 are the owners of large piece of land situated at Lonavala, Taluka: Maval, District: Pune. According to the Plaintiffs, Defendants Nos. 2 to 5 executed power of attorney in favour of Defendant No.1 authorising him to enter into agreement to sell the property. In exercise of the power conferred by the power of attorney executed by Defendants Nos. 2 to 5 and also on his behalf, according to the Plaintiffs, Defendant No.1 signed the agreement of sale dated 23-1-1979. By that agreement, the Defendants agreed to transfer the land at Lonavala at the rate of Rs.25/- per sq.yard. Rs.15000/- were to be paid as earnest money on the date of the agreement. Further amount of Rs.15000/- was to be paid within a period of three months from the date of the agreement and the balance amount was to be paid on completion of the sale and the sale was to be completed within a period of nine months from the date of the agreement. In the agreement, it was declared that the suit land is an agricultural land and that the Defendants have already applied to the

authorities for permission to use the land for non-agricultural purpose. It was stated that the sale will be completed within nine months from the date of the receipt of the permission to use the land for non-agricultural purpose. It is also recited in the agreement that the possession of the land will be handed over to the purchasers on completion of the sale. According to plaint averments, after execution of the agreement of sale the Defendants placed the Plaintiffs in possession of the land with full right and authority to develop the land and raise construction thereon. According to the Plaintiffs, apart from making payment of Rs.15,000/- as earnest money further amount of Rs.15,000/- was also paid. It is stated in the plaint, that from 9th May, 1979 disputes arose between Defendant No.5 and the Defendant No.1. Because of that dispute the sale-deed of the property could not be executed. It is submitted by the Plaintiffs that the Plaintiffs were waiting for the dispute between the Defendant No.1 and Defendant No.5 to be resolved. But when the Plaintiffs saw that the dispute is not getting resolved, they issued a notice to the Defendants dated 25th April, 1980 that they are willing to perform their part of the contract and that the

Defendants should perform their part of the contract and execute the sale deed. When the sale deed was not executed by the Defendants, suit was filed.

. It is to be noted here that, according to plaint allegations, the agreement was executed at Bombay. The property is situated at Lonavala, outside the original jurisdiction of this court and therefore, the Plaintiffs sought leave under Clause 12 of the Letters Patent.

2. On being served, the Defendants appeared. One Written statement has been filed by Defendants Nos. 1 to 4 and other written statement filed on behalf of the Defendant No.5. According to Defendants Nos. 1 to 4 while entering into the agreement of sale, the parties were under mutual mistake that the land is agricultural. Within one month of the execution of the agreement, when the Defendants applied to the Tahsildar, Maval for extract of revenue record, they learnt that the property has been assessed to non-agricultural use with effect from the year 1953. According to the Defendants, therefore, as the agreement to sell was executed under a mutual mistake, no decree for specific performance of that

agreement can be granted. In the written statement, the Defendant No.5 contended that the power of attorney was obtained by Defendant No.1 from her by making misrepresentation and therefore, the agreement is not binding on her. It was also contended that the Plaintiffs had no authority to take possession of the land. The agreement does not contemplate them to be in possession of the land. Defendant No.5 never authorised the Defendant No.1 to hand over possession of the land to the Plaintiffs.

3. Both parties filed documents. The learned single Judge on the basis of rival pleadings and the documents framed issues between the Plaintiffs and the Defendants Nos. 1 to 4 and also framed issues between the Plaintiffs and the Defendant No.5. They read as under:-

ISSUES BETWEEN THE PLAINTIFFS AND

DEFENDANTS NOS.1 TO 4

1. Whether the suit is infructuous as it reveals no enforceable cause of action against any of the defendants?

2. Whether the agreement dated 23-1-1979 between the plaintiffs and the defendants is valid and enforceable in law?

3. In the event that issue No.2 is answered in the affirmative, whether the agreement dated 23-1-1979 between the plaintiffs and defendants is validly terminated?

4. Whether the suit is bad in law for misjoinder of parties?

5. Whether the plaintiffs prove that the plaintiffs are entitled to seek specific performance of the agreement dated 23-1-1979 from Defendants Nos. 3 to 5?

6. Whether the agreement dated 23-1-1979 is bad in law by reason of it being impossible to perform?

7. Whether the nonpayment of the balance purchase price by the plaintiffs on the due date as per the agreement is justified?

8. If the answer to issue No.7 above is in the

negative, whether the agreement is vitiated by nonpayment of the balance consideration by the plaintiffs?

9. Whether it is proved that the suit property was nonagricultural prior to the date of the agreement?

10. Whether the suit property was disclosed as agricultural land in the agreement for sale?

11. Whether the Plaintiff was ready and willing to perform his part of the Agreement for Sale as alleged in paragraph 15 of the Plaint?

12. Whether in the alternative, the Plaintiff is entitled to the relief of damages/compensation as alleged in paragraph 16 of the Plaint?

13. Whether Agreement for Sale stands cancelled as alleged in paragraphs 4 and 10 of the Written Statement of the Defendants Nos.1 to 4?

14. Whether the Defendants Nos. 1 to 4 are entitled to forfeit the amount of Rs.30,000/- as alleged in paragraph 12 of the Written Statement of Defendants

Nos.1 to 4?

15. Whether the Plaintiff is liable to pay interest on the balance purchase price at the rate of 18 per cent per annum as alleged in paragraph 4 of the Written Statement of Defendant Nos. 1 to 4?

16. Whether the Defendant Nos.1 to 4 prove that the suit has been filed in collusion between the Plaintiff and Defendant No.5?

ISSUES BETWEEN THE PLAINTIFF AND

DEFENDANT NO.5

1. Whether this Hon'ble Court does not have jurisdiction to try the suit as alleged in paragraph 2(u) of the Written Statement of the Defendant No.5?

2. Whether the Agreement for Sale dated 23rd January, 1979 is void, illegal or of no effect in law or not binding on the Defendant No.5 as alleged in paragraph 2 of the Written Statement of Defendant No.5?

3. Whether the Plaintiff is guilty of gross laches

or delay as alleged in paragraph 2(a) of the Written Statement of Defendant No.5?

4. Whether the Defendant No.1 has acted illegal or in breach of trust as alleged in paragraph 2(h) of the Written Statement of Defendant No.5?

5. Whether the Plaintiff and Defendant Nos.1 to 4 are in collusion with each other as alleged in paragraph 2(q) to (s) of the Written Statement of Defendant No.5?

4. The learned single Judge decided the suit by judgment dated 8th September, 2000. The learned single Judge dismissed the suit.

5. Perusal of the judgment of the learned single Judge shows that the learned single Judge has held that the Plaintiff is not entitled to a decree of specific performance of the contract, because according to the learned single Judge the agreement was entered into under a mutual mistake that the land on the date on which the agreement was entered into is assessed to agricultural use. The learned single Judge has also found that the Plaintiff has not made

any prayer for a decree of possession. The learned single Judge held that even assuming that the Plaintiff is in possession of the land, his possession cannot be termed as authorised possession, because neither the agreement authorises him to be in possession not does the power of attorney executed by Defendants Nos. 2 to 5 in favour of the Defendant No.1 authorises the Defendant No.1 to place the Plaintiff in possession.

6. We heard the learned Counsel appearing for both sides at length. Principal submission of the learned Counsel appearing for the Appellant was on the basis of the explanation appearing below Section 20 of the Indian Contract Act. The learned counsel submitted that the learned single Judge was not justified in holding that the agreement was entered into under a mutual mistake. The learned counsel submits that the purpose for which the land is assessed has direct nexus to the value of the land. In view of the explanation appearing below Section 20, it cannot be said that the agreement was entered into under mutual mistake.

7. We have perused the entire record. Perusal of

the judgment of the learned single Judge shows that mainly three considerations weighed with the learned single Judge for not making a decree of specific performance in favour of the Plaintiff, grant of which relief was within the discretion of the learned single Judge.

(i) That the agreement was entered into under mutual mistake;

(ii) The Plaintiffs were not in a position to pay money. Therefore, they were not ready and willing to perform their part of the contract;

(iii) In the absence of a claim for a decree of possession, grant of decree of specific performance would be an exercise in futility;

8. Now, taking up the first ground on which the decree of specific performance has been denied to the Plaintiffs, namely that the agreement was entered into under a mutual mistake, perusal of the agreement shows that the land was agreed to be purchased by the Plaintiffs for the purpose of raising construction on the land. Perusal of clause (9) of the agreement

makes that intention of the purchasers/plaintiffs clear. Clause (9) reads as under:-

> 9. On execution of these presents, the Purchaser shall be entitled to put up boards and advertising in News Papers announcing a scheme for housing as purchasers may deem fit, and to sell and enter into agreement for sale of flats, bungalows, shops, garages, etc. of the proposed buildings on ownership basis or on such terms as the Purchasers may deem fit. The Purchasers will also be entitled to organise societies and schemes under the Apartments Ownership Act.

Therefore, the purpose for which the land is permitted to be used was of vital importance. In clause (2) clear-cut declaration was made by the Defendants Nos. 1 to 5 "The Vendors declare the land hereby agreed to be sold is agricultural". In clause (4), it is stated that " The Vendors hereby declare that the tenure of the land contracted to be sold is Agricultural and is free hold subject to the payment of the usual Government Land Revenue". Thus, when the agreement was entered into, both sides were under

the impression that the land is permitted to be used for agricultural purpose. It also appears to be an admitted position that because both the parties were under the impression that the land is permitted to be used for agricultural purpose, the Defendants were to make an application for permission to use the land for non-agricultural purpose and secure the permission, and therefore, in clause (8) it is recited "The sale shall be completed within a period of nine months from the date of the receipt of the non-agricultural permission". It is an admitted position that within one month of the signing of the agreement, both sides came to know that the land has already been permitted to be used for non-agricultural purpose either in the year 1953 or 1956. Thus, it is clear that at the time when the agreement was entered into, parties were under a mutual mistake in relation to vital term of the agreement. Section 20 of the Contract Act reads as under:-

> 20. Agreement void where both parties are under mistake as to matter of fact.- Where both the parties to an agreement are under a mistake as to a matter of fact essential to

the agreement the agreement is void.

9. Perusal of the above quoted provisions shows that if the parties to an agreement are under a mistake as to a matter of fact essential to the agreement, the agreement is void. The use to which the land is permitted to be put by the parties in the present case was a fact essential to the agreement, because the Plaintiffs were intending to purchase the land for raising construction on the land. In so far as the reliance placed by the learned counsel appearing for the Plaintiffs on the explanation is concerned, perusal of the explanation shows that erroneous opinion as to value of the things which forms the subject matter of the agreement is not deemed to be a mistake as to a matter of fact. The learned single Judge has considered this aspect of the matter and has said that this was not a matter of opinion as to value of the things, because the Plaintiffs' witness has himself stated in his deposition that the price was agreed to be paid under the belief that permission for using the land for non-agricultural purpose would be obtained. Therefore, the parties were not under any mistake as to the value of the land. One more aspect that is required to be

considered is that there is a clear term in the agreement that the sale deed would be executed within nine months from the grant of permission. It is an admitted position that the Plaintiffs came to know within one month of signing of the agreement that the land has already been permitted to be used for non-agricultural purpose. Therefore, it was the duty of the Plaintiffs to tender the agreed amount of consideration to the Defendants and require them to execute the sale-deed in favour of the Plaintiffs. Admittedly, the Plaintiffs have not done that. The explanation that was given before us was that because disputes were going on between the Defendant No.1 and Defendant No.5, the consideration was not tendered. In our opinion, this explanation is merely an excuse. Assuming that there were disputes going on between the Defendant No.1 and Defendant No.5 and the Defendant No.5 had cancelled the power of attorney executed by her in favour of the Defendant No.1, nothing prevented the Plaintiffs from offering to all the Defendants their share of balance amount of consideration. We do not find any explanation given anywhere as to why this was not done. It appears that this was not done because the Plaintiffs were not in a position to perform their part of the

agreement. The learned single Judge, in our opinion, in this regard has rightly referred to the conduct of the Plaintiffs of seeking installments for deposit of the balance amount of consideration in the court. The learned single Judge has, therefore, held that the Plaintiffs did not offer the amount to the Defendants, because the Plaintiffs were not in a position to perform their part of the contract and make payment of the balance amount of consideration.

10. It is, thus, clear that the learned single Judge was justified in concluding that the Plaintiffs were not in a position to pay the balance amount of consideration and therefore, were not in a position to perform their part of the contract.

11. According to averments in the plaint, the agreement of which specific performance is sought was executed at Bombay. The land is situated at Lonavala, outside the original jurisdiction of this court. The Defendants reside in Pune, outside the original jurisdiction of this court. Therefore, the suit was filed in this court, because a part of cause of action arose here. In the suit, there is no prayer made for a decree of possession. The cause of

action for securing the decree of possession accrued to the Plaintiffs when cause of action to file the suit for decree of specific performance accrued to the Plaintiffs. Therefore, the Plaintiffs ought to have filed the suit for a decree of specific performance as also a decree of possession of the land. But the Plaintiffs have omitted to claim decree of possession. Therefore, in terms of the provisions of Order 2 Rule 2 of the C.P.C., the Plaintiffs have relinquished their entitlement to claim a decree of possession and therefore, now they can not institute a suit for that relief. The Plaintiffs have not claimed a decree of possession presumably because, according to them, they were placed in possession of the land by Defendant No.1 after the agreement was executed in their favour. In our opinion, assuming this to be true, then also possession of the land of the Plaintiffs cannot be termed as an authorised possession. Firstly, because the possession alleged to have been handed over to the Plaintiffs by Defendant No.1 is contrary to the terms of the agreement. Clause 10 of the agreement reads as under:-

> 10. On completion of the sale, the Vendors

shall hand over quiet vacant and peaceful possession of the said property.

12. Thus, as per the agreement possession was to be handed over after completion of the sale. So far as the agreement is concerned, it is an admitted position that the land was owned by all the five Defendants and Defendant No.1 was acting on behalf of the Defendants Nos. 2 to 5 on the basis of power of attorney executed by Defendants Nos.2 to 5 in favour of Defendant No.1 dated 15-1-1979. Perusal of that power of attorney shows that by that power of attorney the Defendant No.1 was authorised by Defendants Nos. 2 to 5 to enter into an agreement for sale of the property at such price as he may deem proper. By the power of attorney, he was also authorised to agree to include a clause in the agreement of sale permitting the purchaser to draw water from the Well on the other part of the property. The Defendant No.1 was also authorised to execute a deed of conveyance transferring the property. In exercise of the power conferred on him, by the power of attorney, the Defendant No.1 entered into an agreement with the Plaintiffs dated 23-1-1979. That agreement contained a clause that

possession will be handed over to the purchasers on completion of the sale-deed. After having entered into the agreement which contained a clause that possession of the land is to be handed over to the purchasers on completion of the sale, under the power of attorney only power that remained with the Defendant No.1 was to execute the sale-deed. He had no power to hand over possession of the land to the Plaintiffs. Therefore, even if it is assumed that the Defendant No.1 handed over possession of the land to the Plaintiffs contrary to the terms in the agreement, possession of the land of the Plaintiffs would be unauthorised and therefore, unless the Plaintiffs claim a decree of possession from this court or a decree ratifying handing over of possession by Defendant No.1 to them, the Plaintiffs can not get lawful possession of the land. If the Plaintiffs can not get lawful possession of the land, then making a decree of specific performance in their favour would be an empty formality.

13. Thus, we find no reason to disturb any of the findings recorded by the learned single Judge. In the result, therefore, the Appeal fails and is

dismissed. Appellants shall pay costs of the Appeal to the Respondents.

(D.K.DESHMUKH, J.)

(J.H.BHATIA, J.)

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